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11 Attorneys for Plaintiff

12 UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
14

15 Marco Maestrini,

Case No. C 07 2941 PJH

16 Plaintiff,

**PLAINTIFF'S OPPOSITION IN PART TO  
DEFENDANTS' MOTION TO DISMISS  
FOR FAILURE TO STATE A CLAIM  
(FRCP 12(b)(6))**

17 vs.

18 CITY AND COUNTY OF SAN FRANCISCO,  
19 a municipal corporation; HEATHER FONG, in  
20 her capacity as Chief of Police for the CITY  
21 AND COUNTY OF SAN FRANCISCO; JESSE  
22 SERNA, individually, and in his capacity as a  
23 police officer for the CITY AND COUNTY OF  
24 SAN FRANCISCO; and, San Francisco police  
25 officers DOES 1-25, inclusive,  
26

Time: 9:00 a.m.  
Date: September 12, 2007  
Location: Ctrm 3, 17<sup>th</sup> Floor

Hon. Phyllis J. Hamilton

27 Defendants.  
28 /

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. NON-OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CLAIM FOR DISCRIMINATION UNDER CALIFORNIA CIVIL CODE SECTION 51.7**

Plaintiff does not oppose Defendant's motion to dismiss his Eighth Cause of Action alleging violation California Civil Code section 51.7.

**II. DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S CLAIM FOR VIOLATION OF CALIFORNIA CIVIL CODE SECTION 52.1 SHOULD BE DENIED.**

When deciding a Motion to Dismiss for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all material fact allegations of the Complaint. *Gillespie v. Civiletti* (9<sup>th</sup> Cir. 1980) 629 F.2d 637, 640; *Rendon v. Fresno Police Dept.*, 2006 WL 2694358 (E.D. Cal.).

Complaints should not be dismissed unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. FRCP Rule 12(b)(6); *Gillespie v. Civiletti* (9<sup>th</sup> Cir. 1980) 629 F.2d 637, 640; *Strother v. Southern California Permanente Medical Group* (9<sup>th</sup> Cir. 1996) 79 F.3d 859, amended on denial of rehearing; *Lewis v. Telephone Employees Credit Union* (9<sup>th</sup> Cir. 1996) 87 F.3d 1537, 1545; *Kerr v. Federal Emergency Management Agency* (C.A. 8, Mo. 1997) 113 F.3d 884.

On a motion to dismiss for failure to state a claim, the Court is bound to give Plaintiff the benefit of every reasonable inference that can be drawn from well-pleaded allegations of the Complaint. *Youngberg v. Bekins Co.* (E.D. Cal. 1996) 930 F.Supp. 1396.

This standard governing motions to dismiss for failure to state a claim is applied even more liberally where Plaintiff alleges civil rights violations. *Bernheim v. Litt* (N.Y. 2d Cir. 1996) 79 F.3d 318, 321-322.

1 In the instant matter, Plaintiff has sufficiently pleaded a violation of Civil Code section 52.1.  
2 Plaintiff's Ninth Cause of Action, violation of California Civil Code section 52.1, incorporates in it  
3 all preceding paragraphs of Plaintiff's Complaint (paragraphs 1 through 51), including the statement  
4 of facts. At paragraph 10 of his Complaint, Plaintiff alleges that he and a friend witnessed several  
5 San Francisco Police Department officers beating a man in a manner that appeared to be excessive.  
6 Plaintiff asked the officers "What's going on?" As alleged in Plaintiff's complaint, the act of  
7 questioning the officers provoked a violent response from Defendant Officer SERNA, who grabbed  
8 Plaintiff from behind and slammed his head several times against the side of a parked paddy-wagon.  
9 While doing so, Defendant Officer repeatedly ordered Plaintiff to "Shut up!"  
10

11  
12 Defendant Officer SERNA slammed Plaintiff's head again after Plaintiff asked Defendant  
13 Officer SERNA what his name was and again when Plaintiff asked what he had done. The First  
14 Amendment right of freedom of speech protects the rights of citizens to verbally oppose and/or  
15 challenge police action so long as that challenge does not involve a threat or fighting words.  
16 *Gulliford v. Pierce County* 136 f.3d 1345 (9<sup>th</sup> Cir. 1997). Threats and fighting words by Plaintiff in  
17 the instant matter are absent. As plead, Defendant Officer SERNA's use of excessive force against  
18 Plaintiff carried with it the intent to interfere with Plaintiff's substantive rights under the First  
19 Amendment to verbally oppose or challenge police action.  
20

21  
22 Furthermore, Plaintiff alleges in his complaint at paragraph 53 that Defendant Officer SERNA  
23 interfered with Plaintiff's exercise and enjoyment of his civil rights, through the use of excessive  
24 force, and the failure to make any proper or reasonable detention of said Plaintiff. Defendant Officer  
25 SERNA used excessive force to arrest Plaintiff in violation of Plaintiff's Fourth Amendment rights to  
26 be free from unreasonable seizures. When Plaintiff initially questioned the San Francisco Police  
27 officers who he observed using force against another person, he did so while exercising his First  
28

1 Amendment rights to free speech, as well as the right not to be arrested without probable cause and  
2 the right not to have unreasonable force used against him. The “threats, intimidation and coercion” of  
3 Defendant Officer SERNA were physical as well as verbal (in the form of “shut up”). One can  
4 reasonably draw the inference that the Defendant Officers, including Defendant Officer SERNA,  
5 intended to violate Plaintiff’s First and Fourth Amendment rights by the use of excessive force and  
6 false arrest.  
7

8 In *Cole v. Doe 1 thru 2 Officers of City of Emeryville Police Dept.* 387 F.Supp.2d 1084, 1102-  
9 1104 (N.D.Cal, 2005) Magistrate Judge Chen held that a Plaintiff stated sufficient facts to support a  
10 violation of California Civil Code section 52.1 based on alleged interference with that Plaintiff’s right  
11 to be free from unreasonable searches and seizures under the California Constitution. In that case,  
12 Magistrate Judge Chen found that “Use of law enforcement authority to effectuate a stop, detention  
13 (including the use of handcuffs), and search can constitute interference by ‘threat[ ], intimidation, or  
14 coercion’ if the officer lacks probable cause to initiate the stop, maintain the detention, and continue a  
15 search.” *Id* at 1103.  
16  
17

18 As stated in *Jones v. Kmart Corp.*, 17 Cal. 4<sup>th</sup> 329, 334 (1998), section 52.1 requires “an  
19 attempted or completed act of interference with a legal right, accompanied by a form of coercion.”  
20 Plaintiff MAESTRINI has alleged a use of force and a false imprisonment that interfered with his  
21 legal rights under the Fourth Amendment. The use of force and the false imprisonment committed by  
22 Defendant Officer SERNA were done under his law enforcement authority to use force and make  
23 detentions. As pleaded by Plaintiff MAESTRINI, these interferences with Plaintiff’s legal rights were  
24 without probable cause to detain or arrest, and without lawful justification to use the force alleged by  
25 Plaintiff. Lacking justification or probable cause, Defendant SERNA’s use of his law enforcement  
26 authority constitutes interference by threats, intimidation, or coercion in violating Plaintiff’s rights.  
27  
28

1                   **III.     PLAINTIFF CAN MAINTAIN HIS STATE LAW CLAIM FOR**  
2                   **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN ADDITION**  
3                   **TO BATTERY BY A POLICE OFFICER**

4                   Plaintiff will dismiss his negligence claims against Defendants, since this matter is a case of  
5                   excessive force and false arrest.

6                   Although not addressed by Defendants, Plaintiff's Fifth Cause of Action is a state law claim  
7                   against Defendant Officer SERNA and DOES 1-10 for False Imprisonment. Plaintiff alleges that  
8                   Defendant Officer SERNA and DOES 1-10 falsely imprisoned him without probable cause and used  
9                   excessive force against him while he was falsely imprisoned. Plaintiff also alleges that there was no  
10                  reasonable basis upon which the Defendant Officers could have believed that Plaintiff committed  
11                  any of the crimes for which they issued him a citation. This is a prima facie claim for false  
12                  imprisonment, and it does not appear to be contested by Defendants to the extent their instant motion  
13                  seeks dismissal only of state-law claims pertaining to the use of force by an officer other than  
14                  Battery by a Police Officer, including Plaintiffs sixth, seventh, eighth, ninth, tenth and eleventh  
15                  causes of action.  
16  
17

18                  There is no support to Defendants assertion that a finding that a police officer committed  
19                  Battery by a Police Officer prevents an officer from also being held liable for Intentional Infliction  
20                  of Emotional Distress, which may include use of force allegations.  
21

22                  Defendants argue that Plaintiff has the burden of proving unreasonableness of the force used  
23                  by the Defendant Officers in this matter to make a prima facie case of Battery by a Police Officer.  
24                  Plaintiff has certainly alleged that the use force against him was unreasonable and do not dispute  
25                  Defendants' assertion that if an officer's use of force is found to be reasonable, then it is privileged  
26                  and not subject to further bases of liability. *Edson v. City of Anaheim* 63 Cal.App.4<sup>th</sup> 1269 decided a  
27                  wrongful death action in which a police officer shot and killed Robert Edson when the officer  
28

believed that Edson was reaching for a gun. Leading up to Edson's shooting, Edson reportedly had fled from the officer, then attempted to run the officer over in a vehicle and failed to obey the officer's commands prior to allegedly reaching for a gun and being shot. Thus, the shooting officer made a split second decision to shoot under a dangerous and fluid circumstance that the Plaintiffs in that case were unable to prove was unreasonable at jury trial. Because the use of force was justified, there could be no other basis of liability for Edson's shooting, such as negligence.

Here, Plaintiff alleges, in addition to excessive force and false imprisonment, a cause of action for conduct beyond the use of force: Intentional Infliction of Emotional Distress as cause of action number six. Plaintiff's substantive allegations regarding Intentional Infliction of Emotional Distress are at paragraphs 43 and 44 of his Complaint:

"43. The conduct of Defendants SERNA and DOES 1-10, inclusive, as set forth herein, was extreme and outrageous and beyond the scope of conduct which should be tolerated by citizens in a democratic and civilized society. Defendants committed these extreme and outrageous acts with the intent to inflict severe mental and emotional distress upon Plaintiff.

44. As a proximate result of Defendants' willful, intentional and malicious conduct, plaintiffs suffered severe and extreme mental and emotional distress. Therefore, Plaintiff is entitled to an award of punitive damages as against said defendants. Plaintiff has suffered damages as hereinafter set forth."

BAJI 12.70 provides the relevant jury instruction regarding Intentional Infliction of Emotional Distress, which requires showing that the conduct of the Defendant was unprivileged and requires a greater level of intent than the Battery by a Police Officer cause of action:

"The plaintiff seeks to recover damages based upon a claim of intentional infliction of emotional distress.

The essential elements of this claim are:

- 1 The defendant engaged in outrageous, [unprivileged] conduct;
2. [a.] [The defendant intended to cause plaintiff emotional distress;] [or]  
[b.] [(1) The defendant engaged in the conduct with reckless disregard of the probability of causing plaintiff emotional distress;
- (2) The plaintiff was present at the time the outrageous conduct occurred; and
- (3) The defendant knew that the plaintiff was present;]



1       3 The plaintiff suffered severe emotional distress; and  
2       4 This outrageous [unprivileged] conduct of the defendant was a cause of the emotional  
3       distress suffered by the plaintiff.”

4           The first element of Intentional Infliction of Emotional Distress would not be met if an  
5       officer’s use of force was found to be privileged, and the cause of action would fail. If it is met and  
6       the conduct by the Defendant Officers is not privileged, the remaining elements constitute a separate  
7       cause of action from Battery by a Police Officer based on the officer’s conduct if it was outrageous  
8       and unprivileged. In this matter Officer SERNA's conduct also includes Defendant the use of certain  
9       language directed at Plaintiff MAESTRINI, including “Oh, you’re crying like a little girl.” (at  
10      paragraph 12 of Plaintiff’s complaint). Taking Plaintiff’s allegations as true, the use of force against  
11      Plaintiff by the Defendant Officers was not privileged, and can therefore be considered as evidence,  
12      along with his language, in Plaintiff’s Intentional Infliction of Emotional Distress cause of action.  
13

#### 14           **IV. LIABILITY AGAINST DEFENDANT CITY**

15           Plaintiff will dismiss his claim for negligence and negligent hiring, retention, training and  
16      supervision. However, Defendant remains a proper defendant under California Government Code  
17      section 815.2(a), which provides: “A public entity is liable for injury proximately caused by an act or  
18      omission of an employee of the public entity within the scope of his employment if the act or  
19      omission would, apart from this section, have given rise to a cause of action against that employee or  
20      his personal representative.”  
21

22           Plaintiff alleges that Defendant SERNA acted within the scope of his employment as a police  
23      officer employed by Defendant CITY during the subject-incident of Plaintiff’s complaint. Defendant  
24      CITY is therefore liable to Plaintiff under the principles of respondeat superior embodied in  
25      Government Code section 815.2.  
26  
27  
28

**CONCLUSION**

Plaintiff seeks leave of the Court to amend his Complaint to reflect the contested causes of action and liability of Defendant CITY as described herein.

Dated: August 9, 2007

**The Law Offices of John L. Burris**

/s/ Benjamin Nisenbaum  
Ben Nisenbaum  
Attorney for Plaintiff